SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 536

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
PETITIONER

v.

McCONNELL HEAVY HAULING, INC.,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PARAGON PRINTING CO., LITTLE ROCK

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above entitled case on May 3, 1965.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Arkansas (R. 79-84) printed in Appendix B hereto, infra, p. 13, is reported in 239 Ark. 373, 390 S.W. 2d 111.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on May 3, 1965. R.85. Appendix C hereto, infra, p. 18. Rehearing was denied on June 7, 1965. R.

92. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), since an immunity is claimed under statutes of the United States.

QUESTION PRESENTED

The question presented is whether an agreement made by an interstate common carrier's agent with another carrier to pay the latter for unloading and hauling property transported by the first carrier and delivered to the seccond for a shipper in interstate commerce constitutes an illegal refund or rebate to the shipper under the Interstate Commerce Act and the Elkins Act, so that such agreement is unenforceable.

STATUTES INVOLVED

The statutory provisions are Section 6, par. (7) of the Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. §6, par. (7) and Section 41 of the Elkins Act, 32 Stat. 847, 49 U. S. C. §41. They are reprinted in Appendix A, infra, pp. 9 - 12.

STATEMENT

1. How Federal Question is presented.

The Complaint of Respondent McConnell Heavy Hauling, Inc., as amended, purported to state a cause of action against Petitioner, Chicago, Rock Island and Pacific Railroad Company for unloading and hauling services performed by McConnell. The Complaint alleged that an agent for Rock Island had agreed, on behalf of Rock Island, to pay for those services (R.1-2 and 10-12).

Rock Island's Answer alleged that such an agreement by Rock Island would be discriminatory, would be a rebate and would violate Section 6, par. 7 and Section 41 of the

Interstate Commerce Act. The alleged agreement would therefore be unenforceable and void. R.14. The trial court gave McConnell a judgment and Rock Island appealed to the Supreme Court of Arkansas.

In the Supreme Court of Arkansas, Rock Island preserved its claim of immunity under the Interstate Commerce Act. Its brief, quoted in the opinion of the Supreme Court of Arkansas, stated:

> "For the Railroad to pay the costs of unloading and hauling in this case would be for it to grant an illegal rebate to the shipper. Therefore, any purported agreement to pay such costs would be illegal and unenforceable." R. 81; p. 14, infra.

And

> "The Railroad has been embarrassed by the conduct of this agent in this case and in several other similar transactions in other states. However, whether the Railroad is embarrassed or hard-boiled, it is flatly prohibited by statutes of the United States from absorbing the costs of unloading and hauling steel and thereby, in effect, granting a rebate to the shipper in this case." R. 81; p. 15, infra.

The Supreme Court of Arkansas, however, held that a federal question was not presented and that the federal statutes and cases were not authority in the facts presented. R. 82; p. 17, infra. Accordingly, the judgment for McConnell was affirmed. R. 84; p. 17, infra.

2. Undisputed Facts.

The facts underlying this litigation are virtually undisputed. C. J. Novak was employed by Rock Island as a freight traffic agent. At the time of his employ-

ment, the federal government was building guided missile bases in various parts of the country. Novak was employed to solicit shipping business from suppliers of materials for the construction of the missile bases.

Rock Island had authority to conduct a motor carrier operation in Missouri which allowed it to offer a package proposal to shippers to carry construction materials by rail to the railhead and by truck from the railhead to the construction site.

Although Rock Island had no such authority in other states, Novak solicited transportation business in several other states, offering a similar package proposal to shippers. In that connection he agreed with Panhandle Steel Products Corporation to transport steel components for Panhandle and to absorb any changes in excess of $4.00 a ton for unloading and hauling from the railhead.

He also agreed with McConnell to pay McConnell's charges for unloading and hauling steel carried by Rock Island for Panhandle. Panhandle's steel was shipped on Rock Island trains and bills of lading showed Panhandle as both shipper and consignee. As consignee, it was further identified as being in care of McConnell Heavy Hauling. Upon arrival at the railhead, McConnell was notified, and the steel was unloaded and hauled by McConnell to the construction sites. Under McConnell's tariff, the bill of lading had to be signed when the steel reached its final destination at the construction site. The bills of lading involved here were signed for McConnell by representatives of the missile base contractor.

Pursuant to Novak's directions, McConnell billed Panhandle for the unloading and hauling, and the bills

were sent to Panhandle, in care of Rock Island's traffic representative in Fort Worth, Texas.

When McConnell's bills were not paid, its representative called Panhandle's General Manager and learned of Novak's purported agreement to absorb charges in excess of $4.00 per ton.

McConnell has not sought to collect $4.00 per ton, or any other amount, from Panhandle, but, instead, has brought this action against Rock Island.

Similar patterns of fact were repeated in other states where Novak solicited business for Rock Island.

REASON FOR GRANTING THE WRIT

Under the undisputed facts in this case, there can be no doubt that the shipper (who was also, incidentally, the consignee), received unloading and hauling services from Respondent McConnell, free of charge. The conclusion follows inescapably that such free services constituted a rebate condemned by the Interstate Commerce Act, which prohibits refunding or remitting "in any manner or by any device" rates or charges and further prohibits the extension of "any privileges or facilities" to shippers other than as specified in tariffs.

These prohibitions have been before this Court on numerous occasions, and the decisions have been consistently against efforts to evade the terms of the statutes.

In *Pittsburgh C., C. & St. L. Ry.* v. *Fink,* 250 U. S. 577 (1919) and in *New York Central Railroad* v. *York & Whitney Co.,* 256 U. S. 406 (1921) the carriers in each case failed initially to collect the full charges specified in their tariffs. In both cases, this Court required pay-

ment of the full charge. In the *York & Whitney* case the Court noted that the obligation was imposed by law and could not be waived by the carrier.

In a later case, Mr. Justice Brandeis stated that a rate specified in a tariff filed with the I.C.C. was not even affected by a third party's tort. *Keough* v. *Chicago & Northwestern Ry.*, 260 U. S. 156 (1922).

Indirect rebates were considered in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516 (1939). There, carriers sued to recover charges for furnishing a particular type of equipment previously afforded shippers without charge. Speaking for a unanimous Court, Mr. Justice Reed held:

> "That section [Section 6 of the Interstate Commerce Act] forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates." 306 U. S. at 521.

This Court has held that "equitable considerations may not serve to justify failure of a carrier to collect or retention by shipper of any part of lawful tariff charges." *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478 (1939). This brings to mind the admonition of the Court in the first case of this series, *Pittsburgh C., C. & St. L. Ry.* v. *Fink*, 250 U. S. 577 (1919), that the enforcement of full tariff rates may result in hardship in some cases. The Court has consistently held that individual cases of hardship had to give way to the public's interest in a national transportation policy involving uniform charges.

On the basis of these authorities, Panhandle could not escape the liability imposed on it by law to pay for all transportation charges, including unloading and hauling, merely by pointing to its agreement with Novak. It remained only for McConnell to demand payment from Panhandle and to seek enforcement of Panhandle's obligation to pay the full tariff charges.

Instead, McConnell sought to collect these charges from Rock Island on the basis of a purported agreement which Rock Island's agent had no authority to make and which was illegal and void in any event.

The decision of the Supreme Court of Arkansas disregards and is inconsistent with all the decisions of the United States Supreme Court from *Pittsburgh C., C. & St. L. Ry.* v. *Fink* to date. No cases holding to the contrary are cited by the Supreme Court of Arkansas in its opinion. That Court merely characterized this controversy as being between two carriers and not involving a shipper and a carrier. Such a characterization ignores the effects of the determination of the controversy upon the shipper in this case. When such effects are considered, the uncontrovertable fact develops that the shipper has received a rebate.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submtited,

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APPENDIX

APPENDIX A

INTERSTATE COMMERCE ACT

Section 6, par. 7.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 41 (THE ELKINS ACT)

(1) Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof

it shall be subject to like penalties as are prescribed in said Acts or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and

imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of Sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or other-

wise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

APPENDIX B

OPINION OF THE SUPREME COURT OF ARKANSAS

In July, 1962, three representatives of appellant company Chicago, Rock Island and Pacific Railroad, called upon F. O. McConnell, president of McConnell Heaving Hauling, Inc., appellee herein, for the purpose of arranging for McConnell to unload and haul steel components from the Rock Island railhead to various missile construction sites near Little Rock. Charles J. Novak had been employed by the railroad as a special representative to solicit transportation of materials to the construction sites of missile bases. The Missouri Commerce Commission had granted Rock Island authority to operate a subsidiary motor carrier operation in that state, and this allowed Rock Island to offer to shippers a package proposal whereby construction materials were delivered by rail to the railhead nearest the sites, and from the railread to the site by truck. Rock Island did not have the necessary authority to make such a proposal in other states, but Mr. Novak solicited transportation business wherever missiles were being constructed. Rates and billing were not disclosed by Novak with McConnell, but the railroad agent was given a copy of McConnell's tariff, and Novak stated that he would subsequently send billing instructions to McConnell. Some months later, McConnell was notified of the first shipment of steel, and proceeded to unload it from the railroad cars, and to deliver it to the contractor on the missile sites. The steel was shipped on railroad bills of lading, and Panhandle Steel Products Corporation was named as both shipper and consignee. The bill of lading further stated, "c/o McConnell Heavy Hauling." Thereafter, Novak informed McConnell that the unloading and hauling bills

should be sent to Panhandle, and McConnell followed these instructions, but failed to receive payment. Subsequently, a representative of McConnell Company talked to the manager of Panhandle, and learned that Novak had entered into an agreement with Panhandle for that company to pay $4.00 a ton for unloading and hauling from the railhead, with the Rock Island to pay the balance of unloading and hauling costs. It is undisputed that McConnell never agreed to perform the work for $4.00 a ton, but rather has insisted at all times upon receiving its full tariff rates, which were considerably higher.

After getting back the invoices sent to Panhandle, appellee made demand upon the Rock Island for the full amount due, *viz,* $3,097.25 for unloading, and $2,855.00 for hauling. Payment was refused by appellant. Subsequently, McConnell instituted suit for the total amount, and, after the filing of an answer, denying liability, the case was tried by the Pulaski County Circuit Court, sitting as a jury. After hearing testimony, the court entered its judgment in favor of appellee in the amount of $5,952.25, together with interest at the rate of six percent per annum until paid, and from such judgment, appellant brings this appeal. For reversal, appellant relies solely upon the following single point:

> "For the Railroad to pay the costs of unloading and hauling in this case would be for it to grant an illegal rebate to the shipper. Therefore, any purported agreement to pay such costs would be illegal and unenforceable."

This litigation is somewhat unusual in that there is no dispute, but that McConnell Company performed services, and there is no disagreement as to the value of the services performed.

Appellant states that McConnell, instead of properly suing Panhandle Corporation, has sought to make the railroad liable on an oral contract, entered into by an agent (Novak), who had no authority to contract. From appellant's brief:

> "The Railroad has been embarrassed by the conduct of this agent in this case and in several other similar transactions in other states. However whether the Railroad is embarrassed or hard-boiled, it is flatly prohibited by statutes of the United States from absorbing the costs of unloading and hauling steel and thereby, in effect, granting a rebate to the shipper in this case."

Appellant then cites a number of cases, which it contends to be controlling in this litigation. However, we do not agree that the cases cited are applicable to the case at bar, for the authority relied upon by appellant involves agreements between carrier and shipper, carrier and consignee, et cetera. Here, we have an agreement *between two carriers.* McConnell testified that no mention was made of Panhandle when Novak made the arrangements for McConnell Company to unload the railway cars and haul the material to the missile sites, and John Hicks, terminal manager for McConnell Company, gave the Rock Island representatives a copy of McConnell's tariffs. From the testimony:

> "Q. Mr. McConnell, was there any discussion at this particular time concerning who was employing your company for this job?
>
> A. No, Chicago said they had, I mean the Railroad said they had the steel to haul and wanted it unloaded and hauled to the site and that we

were common carriers within the line and would we haul for them.

Q. They did not identify any third party? In other words, they asked you to haul for them, is that correct?

A. Yes, sir, that's right."

Albert F. Hatcher of Deerfield, Illinois, Assistant Vice-President of traffic for the Rock Island, testified that in February, 1963, he learned that Novak had been making unauthorized representations to contractors and shippers in various places over the nation, mentioning that he had received a telephone call from a company in Spokane, Washington, requesting payment for work that had been done. He also mentioned similar occurrences in Tucson, Arizona, and Wichita, Kansas. Hatcher testified that when he would finally locate Novak, the latter would deny that he had made any such arrangements, but said that he would "straighten it out." Hatcher stated that Novak's services with the Rock Island were eventually terminated.

Under the undisputed testimony, it accordingly appears that Novak, on behalf of the Rock Island, entered into an agreement with McConnell Company for the latter to haul steel from the railhead at Little Rock to the missile sites; that no mention was made of the steel company for which the hauling was to be performed; that no agreement of any nature was made between appellee and Panhandle; that McConnell Company made known to the railway representatives its rates by furnishing them a copy of its tariff schedule.

Appellant's defense is particularly interesting in one respect. It contends that it could not perform such an

agreement, because same would be illegal, and therefore unenforceable. Yet, as stated by appellee, in its brief:

> "The Appellant is now asking that the Appellee be required to do what it strenuously contends it would be unlawful for Appellant to do. Appellant is asking that Appellee be required to deviate from its own tariff schedule and grant to it, Appellant, an illegal rebate. Appellee is bound by the same laws, and the same regulations of the Interstate Commerce Commission as is the Appellant. Should Appellee agree to accept payment for its services in any amount less or different than the rates and charges specified in its tariff it would amount to an illegal exaction, which is unlawful, and would subject Appellee to penalties."

We think there was substantial evidence to support a finding that McConnell Company did not occupy the status of a consignee — nor the status of an agent of consignor — nor was it an agent of the appellant railroad. This is simply a case where appellee is endeavoring to recover for an indebtedness due for services performed under a hauling and unloading contract with appellant.

Affirmed.

APPENDIX C

JUDGMENT OF THE SUPREME COURT OF ARKANSAS

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Second Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all its costs in this Court, in this cause expended, and have execution thereof. Holt, J., not participating.